plaintiff as the memorandum of charge refers to 'credit facilities' which may be in the form of overdraft, fixed loan etc and the amount due and owing falls squarely within the ambit of the memorandum of charge. Further, the terms of the letters of offer as per exhs 'CLK-13' to 'CLK-16' clearly state that the facilities are subject to review. In any event, the letter of the plaintiff (exh 'CLK-17') advised the conversion of the overdraft facility to a fixed loan and in the event of any disagreement shown of the arrangement as per 'CLK-17' it would show that such arrangement was accepted as no evidence was adduced of disagreement to such arrangement.

In the circumstances, I am of the view that the proper order that should be made is to make an order in terms of the originating summons filed by the plaintiff herein and I do so order.

Application allowed.

Solicitors: *Reddi & Co Advocates; Ibrahim & Co Advocates.*

Reported by *PS Ranjan*

Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S5-31-3640-88
NH CHAN J
22 MARCH 1990

Companies and Corporations — Loans to directors — Company prohibited from guaranteeing or securing loan — Director of company taking loan from third party — Loan secured by charge over company's lands — Whether charge illegal and void — Whether registration of charge may be cancelled for illegality — Companies Act 1965, ss 67 & 133

A director of the plaintiff, which was a private company, took a loan from the defendant, a co-operative society. The loan was secured by a charge on the plaintiff's lands in favour of the defendant. The plaintiff later applied to the court for an order declaring that the charge was void and unenforceable for contravening s 133 of the Companies Act 1965 ('the Act') which, inter alia, prohibited a company from entering into a guarantee or providing any security in connection with a loan made to a director of the company by any other person. The company also sought an order for the cancellation of the registration of the charge and also for the return of all documents of title to the lands.

Held, allowing the plaintiff's application:

(1) Any agreement made in breach of any of the prohibitions in s 67 or s 133 of the Act is illegal, so as to expose the company's officers to penalties. Although s 67 and s 133 do not expressly say that the prohibited transactions are void, this necessarily follows from the fact that the prohibited transactions are made illegal by the Act by subjecting the officers of the company to penalties. The third party charge which was created by the plaintiff company in favour of the defendant co-operative society to secure an illegal loan made by the co-operative society to a director of the plaintiff company was illegal and therefore void and unenforceable by the co-operative society as it had contravened the pohibition in s 133 of the Companies Act 1965 on this type of transaction.

(2) The general rule is that a party cannot recover what he has given to the other party under an illegal transaction but there are exceptions to the rule. The plaintiff's case came within one of the exceptions comprising cases in which the contract or transaction is made illegal and void for the protection of a particular class of the community of which the plaintiff is a member. In such a case, the plaintiff will be permitted to recover.

(3) Section 133 of the Act (or for that matter s 67) was passed to protect the company from having its assets depleted through misuse and not only to protect its creditors and shareholders. The charge transaction in the present case was made illegal and therefore void by virtue of s 133 of the Act.

[*Editorial Note*: The defendant's appeal to the Supreme Court vide Civil Appeal No 02-161-89 was withdrawn on 23 April 1990 and the court (comprising Abdul Hamid LP, Harun Hashim and Ajaib Singh SCJJ) dismissed the appeal and ordered that the security sum of $50,000, interest accrued thereon and deposit of $500 in court be paid forthwith to the plaintiff. This gross sum awarded in lieu of taxation was given by the Supreme Court under O 59 r 9(4)(b)(ii) of the Rules of the High Court 1980.]

Cases referred to

1 *Heald* v *O'Connor* [1971] 2 All ER 1105; [1971] 1 WLR 497 (folld)
2 *Wallersteiner* v *Moir* [1974] 1 WLR 991 (folld)
3 *Selangor United Rubber Estates Ltd* v *Cradock (No 3)* [1968] 1 WLR 1555 (refd)
4 *Dressy Frocks* v *Bock* (1951) 51 SR (NSW) 390 (folld)
5 *DJE Constructions* v *Maddocks* (1981-1982) 6 ACLR 171 (folld)

Legislation referred to

Companies Act 1965 ss 67, 133
Companies Act 1948 [UK] s 54, 190
Companies Act 1980 [UK] ss 49, 52
Companies Act 1981 [UK] ss 42-44
Companies Act 1985 [UK] ss 151-158, 330, 341
Companies Code 1981 [Aust] ss 129, 130, 230
Uniform Companies Act 1961 [Aust] ss 67, 125

Hira Singh (*Asbir Kaur Sangha* and *Manprit Kaur Sangha* with him) for the plaintiff.
Cecil Abraham (*S Suhendran* with him) for the defendant.

Cur Adv Vult

NH Chan J: The plaintiff is a private company. The defendant, which is now under receivership, is a co-operative society registered under the Co-operative Societies Act 1948. The name is misleading; it is not a bank at all. On 7 April 1986, a member of the defendant co-operative society, who was also a director of the plaintiff company, took a loan of $20m from the defendant co-operative society. The loan was secured by a charge on the plaintiff company's lands in favour of the defendant co-operative society as chargee.

The plaintiff's application before me is based purely on law. It asks for a declaration that the third party charge which was created by the plaintiff company in favour of the defendant co-operative society is void and unenforceable for contravening the prohibitions in s 133 of the Companies Act 1965. Section 133, inter alia, prohibits a company from entering into a guarantee or providing any security in connection with a loan made to its director by any other person.

Before I proceed to consider the effect of s 133 of the Companies Act 1965 ('the Act'), I find that it is necessary to make an examination of the position of the equivalent or similar provisions in the Companies Acts of the United Kingdom and Australia. I shall also endeavour to examine some of the authorities from those jurisdictions. I refer to them because they would usefully illustrate the principle which had been held to underlie the application by the courts of the United Kingdom and Australia on the effect of the applicability of this type of provisions in their jurisdictions. These authorities represent a sound and rational development of the law and the principle which underlies them that has found acceptance in these two Commonwealth jurisdictions which, in my opinion, should be endorsed by the courts of this country. I now begin with the position in England.

The English position

Prohibition on a company financing the acquisition of its own shares:

I shall deal first with s 54 of the Companies Act 1948. By this section it was unlawful for a company to give a person financial assistance for the purchase of, or subscription for its own, or its holding company's shares.

> (1) Subject as provided in this section, it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company, or, where the company is a subsidiary company, in its holding company:
>
> [Here follows the three exceptions where the prohibition is not to apply but they are not relevant to the discussion in the present case.]
>
> (2) If a company acts in contravention of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one hundred pounds.

I have extracted the next two paragraphs from the 23rd and 24th editions of *Palmer* and have combined them together.

Section 54 of the 1948 Act was repealed by s 42(13) of the 1981 Companies Act and replaced by ss 42 to 44 of the 1981 Act which in turn were replaced by what are now ss 151 to 158 of the 1985 Companies Act. Section 42 of the 1981 Act and ss 151 to 154 of the 1985 Act re-enact the basic prohibition of s 54 of the 1948 Act in a much modified form and apply to all companies: *Palmer's Company Law* (23rd Ed) (1982), para 38-02 and *Palmer's Company Law*, (24th Ed) (1987), para 39-02.

The actual wording of s 42 of the 1981 Act and of s 151 of the 1985 Act, as in s 54 of the 1948 Act, merely renders the giving of financial assistance 'unlawful' and creates a criminal offence. It says nothing as to the consequence of a breach on the transaction as a whole or even as to whether any security given by the company which assists the purchase of its shares is void. It seems clear, however, that the courts have provided an answer on the identical wording of the former s 54 to both questions. There is no reason to suppose that the following cases are not equally applicable to s 42 of the 1981 Act and s 151 of the 1985 Act: *Palmer's Company Law*, (23rd Ed) (1982), para 38-10 and *Palmer's Company Law*, (24th Ed) (1987), para 39-10.

The following are the cases which are applicable on the question as to whether any security given by the company which assists the purchase of its shares is void. I read para 39-11 from the 24th edition of *Palmer*:

> 39-11 Validity of any security. Roxburgh J in *Victor Battery Co Ltd* v *Curry's Ltd* [1946] Ch 242 held that such a security was valid despite the section but Ungoed-Thomas J in *Selangor United Rubber Estates Ltd* v *Cradock and Ors (No 3)* [1968] 1 WLR 1555 considered that this was incorrect. The argument used by Roxburgh J was that financial assistance could only be given under s 54 so as to constitute the criminal offence if the security was valid, an invalid security could give no assistance. Ungoed-Thomas J, however, pointed out that a security could never give financial assistance in the narrow sense of payment, it was security for repayment. If a wider meaning of financial assistance was therefore adopted 'its being the means of giving financial assistance does not depend on its being valid, at any rate, when the financial assistance is in fact given. Indeed the greater the invalidity the greater the assistance, because the less the liability to repay': at p 2055. This view was followed by Fisher J in *Heald* v *O'Connor* [1971] 1 WLR 497 where a security was held to be invalid if given in contravention of s 54 of the 1948 Act, the section was even held to be infringed if the provision of the security was ultra vires the company because it was sufficient that the lender believed that the security was valid. A guarantee supporting an agreement invalid under s 54 has likewise been held to be void: *Heald* v *O'Connor*.

Prohibition on company giving loans, etc to directors and persons connected with them:

I shall now turn to s 190(1) of the 1948 Companies Act which deals with the prohibition of loans, etc to directors by a company.

> It shall not be lawful for a company to make a loan to any person who is its director or a director of its holding company, or to enter into any guarantee or provide any security in connection with a loan made to such a person as aforesaid by any other person:

[Here follows the three exceptions where the prohibition is not to apply but they are not relevant to the discussion in the present case.]

Just as in s 54, the actual wording of s 190(1) of the 1948 Act merely makes it unlawful for a company to lend money to any of its directors (or, where it is a subsidiary, to a director of its holding company), nor may it guarantee or provide security in connection with a loan made by a third person to any such director. Again, it is silent as to whether such transactions are to be invalid or void.

Since the courts have already provided an answer on the identical words 'It shall not be lawful' in s 54 of the 1948 Act, there is therefore no reason to suppose that those cases are not also equally applicable to s 190(1) of the 1948 Act.

This is how it was put by Pennington, *Company Law* (4th Ed) (1979) at p 521:

> It would seem that a guarantee or security given by a company for a loan made to its director is void if the giving of the guarantee or security is unlawful.

Pennington's support for this view, as given in the footnotes, is *Heald* v *O'Connor*,[1] decided under the Companies Act 1948, s 54(1).

It is easy to understand the rationale behind this view. It can be seen plainly that the statutory prohibition, on loans to guarantees given or securities provided by a company to or for its directors, is intended to protect the company's assets from being depleted through misuse by its directors.

It has been held in *Wallersteiner* v *Moir*[2] that s 54 of the 1948 Act was passed to protect the company from having its assets misused and not only to protect its creditors and shareholders (see the headnote at p 993). Lord Denning MR said, at p 1014:

> In *Essex Aero Ltd* v *Cross* (17 November 1961; Bar Library Transcript No 388 of 1961), Harman LJ said: 'the section was not enacted for the company's protection but for that of its creditors; ... the company, ... cannot enforce it.' I do not agree. I think the section was passed so as to protect the company from having its assets misused.

Scarman LJ said, at p 1033:

> ... the section must have been enacted to protect company funds and the interests of shareholders as well as creditors. I do not agree with the dictum of Harman LJ in *Essex Aero Ltd* v *Cross* (17 November 1961; Bar Library Transcript 388 of 1961) to the effect that the section was enacted not for the company's protection but for that of its creditors.

By analogy, there is no reason to suppose that *Wallersteiner* v *Moir*[2] is not equally applicable to s 190 of the 1948 Act.

If a guarantee or security given by the company in contravention of the prohibition is void and therefore unenforceable, then the company's assets would not be depleted. However, if a company makes a loan to its director in contravention of the prohibition, can the director say that he is under no obligation to repay because the transaction is prohibited by statute and for that reason is illegal and therefore void? If the director was allowed to succeed, he would not have to repay the loan and the company's assets would have been depleted. Plainly, such a result would not have protected the company's funds from being misused, a result which is against the real purpose of the section.

There are two ways of circumventing the harsh consequence of invalidity. One is the path suggested by Pennington in its 4th edition (1979), at p 521 and the other is by statute expressly providing for it, as in s 52 of the 1980 Act and s 341 of the 1985 Act.

In 1979, evidently, so that in order to avoid such a harsh result, Pennington in its 4th edition (1979) sought to provide a solution or answer to it. This is how it was put (*Pennington's Company Law* (4th Ed, 1979), at p 521):

> If a company makes an unlawful loan to a director, it would seem that the company may recover it despite the illegality of the contract, because the company is not in pari delicto with the director, who must have committed a breach of duty either in inducing the board to make the loan, or in accepting it from the board. It would seem that the company's right to recover the loan would not be affected if its members authorized the loan in advance, or ratified it after it had been made, by passing a resolution in general meeting; this is because members cannot validate illegal acts done by directors, although they can ratify lawful acts irregularly carried out: *Hogg* v *Cramphorn Ltd* [1976] Ch 254; [1966] 3 All ER 420; *Bamford* v *Bamford* [1970] Ch 212; [1969] 1 All ER 969.

Evidently, so that in order to avoid the harsh consequence of invalidity, s 52 of the 1980 Act and s 341 of the 1985 Act have been designed by expressly enacting that a transaction entered into by a company in contravention of the prohibitions (s 49 of the 1980 Act and s 330 of the 1985 Act) shall be voidable by the company. 'Statutes, of course, could so provide expressly' — per Ungoed-Thomas J in *Selangor United Rubber Estates Ltd* v *Cradock (No 3)*[3] at p 1658.

Pennington, *Company Law* (5th Ed, 1985), at pp 645 and 646, explains the effect of the voidable provisions, thus:

> The result of these provisions is that the company which has made a loan or quasi-loan or entered into a transaction which contravenes the statutory prohibitions may either affirm the transaction and enforce its normal right (eg sue for repayment of a loan with interest) without being met by the defence that the transaction is illegal and therefore void; or the company may rescind the transaction and recover what it has given under it, eg rescission of a mortgage created by the company to secure an illegal loan made by a third person, or rescission of an assignment of such an illegal loan and recovery of the amount paid by the company for it; or the company may recover any gain made by the other party to the transaction, eg the profit made on the sale of an investment acquired with an illegal loan or the company can sue the person responsible

for the transaction to recover any loss the company has suffered in consequence.

If a prohibited transaction is voidable at the instance of the company, then it is plain that when the company seeks to enforce its rights against any errant director, the defence that the transaction is prohibited by statute and that therefore it is illegal and therefore void can no longer be sustained. This is because the company has chosen to affirm the transaction, thus treating it as not void, and sue to enforce its rights, such as, for repayment of a loan.

On the other hand, the company may treat the transaction as void by rescinding it and recover what it has given under it, like rescinding a mortgage created by the company to secure an illegal loan made by a third person to its director.

The Australian position

Prohibition on a company financing the acquisition of its own shares:

I shall first deal with s 67 of the Uniform Companies Act 1961 which is reproduced below:

> (1) Except as is otherwise expressly provided by this Act no company shall, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, give any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.
>
> (2) [Here follows the three exceptions where the prohibition is not to apply but they are not relevant to the discussion in the present case.]
>
> (3) If there is any contravention of this section, the company and every officer of the company who is in default shall be guilty of an offence against this Act.
>
> Penalty: Imprisonment for three months or five hundred pounds.

Ford, *Company Law* (2nd Ed, 1978) at pp 179 and 180, clearly explains the position in Australian law regarding this section:

> An agreement made in breach of the prohibition on a company giving financial assistance for the purchase of its shares is not only illegal, so as to expose the company and its officers to penalties (UCA ss 67(3) and 380(3)) [see the cases cited in the footnotes, below] but is also void: *Heald* v *O'Connor* [1971] 1 WLR 497. Any guarantee of obligations under the agreement may also be void: *Heald* v *O'Connor*.

The cases relied on by Ford in support of illegality, is given in the footnotes, thus:

> *Dressy Frocks Pty Ltd* v *Bock* (1951) 51 SR (NSW) 390 distinguishing *Victor Battery Co Ltd* v *Curry's Ltd* [1946] Ch 242; *Shearer Transport Co Pty Ltd* v *McGrath* [1956] VLR 316; *EH Dey Pty Ltd (In liq)* v *Dey* [1966] VR 464; *Re Galpin, ex p Chowilla Timber Supply Co Ltd* (1967) 11 FLR 155; *Re Ferguson, ex p EN Thorne & Co Pty Ltd* (1969) 14 FLR 311; *Heald* v *O'Connor* [1971] 1 WLR 497 in which *Victor Battery Co* v *Curry's Ltd* [1946] Ch 242 was not followed.

Three of these Australian cases have been approved and applied by Fisher J in the English case of *Heald* v *O'Connor*.[1] This is what the judge said, at p 502:

> The reasoning and conclusion of Roxburgh J in *Victor Battery Co Ltd* v *Curry's Ltd* [1946] Ch 242 have been questioned in *Palmer's Company Law* (21st Ed, 1968) at p 447 and in three Commonwealth decisions, *Dressy Frocks Pty Ltd* v *Bock* (1951) SR (NSW) 390; *Shearer Transport Co Pty Ltd* v *McGrath* [1956] VLR 316 and *EH Dey Pty Ltd* v *Dey* [1966] VR 464, and more recently by Ungoed-Thomas J in *Selangor United Rubber Estates Ltd* v *Cradock (No 3)* [1968] 1 WLR 1555, 1656 to 1659. I am impressed by these criticisms and I propose to adopt them and to find in the contrary sense to Roxburgh J. The reason which leads me to that decision is set out in the reports of those cases and I need not repeat it.

This is what Ford, *Company Law* (2nd Ed, 1978) has to say on s 67 of the 1961 Act, at p 180:

> Although the Act does not expressly say that the contract by which the company gives the financial assistance (as, for example, a contract of loan) is void, this necessarily follows from the fact that the contract is made illegal by the Act. Thus a company could lend its money to a man to enable him to acquire its shares, and he could be under no obligation to repay. This seems a hard result since the company's assets would have been depleted and he would become the owner of the shares without paying their full value. But this is what the clear language of the Act is thought to require: *Dressy Frocks Pty Ltd* v *Bock* (1951) 51 SR (NSW) 390.

Section 67 of the Uniform Companies Act 1961 was replaced by s 129 of the Companies Code 1981 which re-enact the basic prohibition of s 67 of the 1961 Act in a much modified form.

Evidently, so that in order to avoid the harsh consequence of invalidity (as can be seen from the example pointed out by Ford above which was taken from *Dressy Frocks* v *Bock*[4] at pp 393 and 395), s 130 of the 1981 Companies Code has been designed by expressly enacting that a transaction entered into by a company in contravention of the prohibition in s 129 of the 1981 Companies Code is voidable at the option of the company.

Prohibition on company giving loans, etc to directors and persons connected with them:

The other prohibition, next to s 67 of the Uniform Companies Act 1961, is s 125 which prohibits a company not only from the making of loans to its directors but also the entry into any guarantee or the provision of any security in connection with a loan to a director by another person: see Ford, *Company Law* (2nd Ed, 1978) at p 355. Unlike s 67, s 125 has the following subsection, thus:

> (5) Nothing in this section shall operate to prevent the company from recovering the amount of any loan or amount for which it becomes liable under any guarantee entered into or in respect of any security given contrary to the provisions of this section.

Section 125 of the Uniform Companies Act 1961 was replaced by s 230 of the 1981 Companies Code which re-enacts the basic prohibition of s 125 of the 1961 Act in a much modified form.

As in s 125(5) of the 1961 Act, s 230 of the 1981 Code has a similar subsection, sub-s (7), thus:

> Nothing in this section operates to prevent the company from recovering the amount of, or of any interest on, any loan made, or any amount for which it becomes liable under any guarantee given or in respect of any security provided, contrary to the provisions of this section.

Ford, *Company Law* (4th Ed, 1986) at p 405 states:

> The Act preserves the company's right to recover the loan or the amount of its liability under the guarantee or in respect of any security given contrary to the Act. This excludes any possible argument that because the transaction is tainted with illegality the courts should not assist the company. The section does not affect any defence of illegality available to the company if it were sued on a guarantee given in breach of s 230.

The subsection only applies to the company's right to take action against an errant director and to preclude the defence that the transaction is prohibited by statute and is illegal and therefore void so that the courts would not assist the company.

The law in Malaysia

Under our Companies Act 1965, the two sections are ss 67 and 133 of which I reproduce the relevant parts below:

> 67 (1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.
>
> ...
>
> (3) If there is any contravention of this section, the company and every officer of the company who is in default shall be guilty of an offence against this Act.
>
> Penalty: Imprisonment for one year or two thousand five hundred dollars.

Subsection (3) has since been amended by Act A616 as shown below which is in force from 16 February 1986.

> (3) If there is any contravention of this section, the company is, notwithstanding section 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.
>
> Penalty: Imprisonment for two years or ten thousand ringgit or both.
>
> ...
>
> (6) Nothing in this section shall operate to prevent the company from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable on account of any financial assistance given in contravention of this section.
>
> 133(1) A company (other than an exempt private company) shall not make a loan to a director of the company or of a company which by virtue of section 6 is deemed to be related to that company, or enter into any guarantee or provide any security in connection with a loan made to such a director by any other person but nothing in this section shall apply...
>
> [here follows the three exceptions where the prohibition is not to apply but they are not relevant to the present case]
>
> ...
>
> (4) Where a company contravenes this section any director who authorizes the making of any loan, the entering into of any guarantee or the providing of any security contrary to this section shall be guilty of an offence against this Act.
>
> Penalty: Ten thousand ringgit.
>
> (5) Nothing in this section shall operate to prevent the company from recovering the amount of any loan or amount for which it becomes liable under any guarantee entered into or in respect of any security given contrary to this section.

It can be seen at once that ss 67(6) and 133(5) are similar in terms to s 230(7) of the Australian Companies Code 1981. What is said in Ford, *Company Law* (4th Ed, 1986) at p 405 (which I have referred to earlier in reference to s 230(7) of the Australian Companies Code 1981) should be equally applicable to s 133(5) of our Companies Act 1965. As pointed out in Ford, the subsection only applies to the company's right to take action against an errant director without being met by the defence that the transaction is prohibited by statute and is illegal and therefore void. It does not affect any defence of illegality available to the company if it were sued on a transaction entered into in breach of it, thus making the transaction unenforceable against the company.

The subsection does not apply if the company were to sue to recover what it had given as guarantee or security to the person who had made a loan to a director of the company so that it would not preclude the defence that because the transaction is tainted with illegality the courts should not assist the company.

In this judgment, I am only concerned with s 133 of the 1965 Act although any decision on this section concerning the validity of transactions prohibited by the section would be equally applicable to s 67 of the Act.

Section 133 prohibits a company from the making of loans to its directors as well as the entry into any guarantee or the provision of any security in connection with a loan to a director of the company by another person. And s 67 prohibits a company from giving financial assistance to its directors (or, where it is a subsidiary, to a director of its holding company) for the purchase of its shares.

Any agreement made in breach of any of the prohibitions in s 67 or s 133 of the Act is illegal, so as to expose the company's officers to penalties. Although s 67 and s 133 do not expressly say that the prohibited transactions are void,

this necessarily follows from the fact that the prohibited transactions are made illegal by the Act by subjecting the officers of the company to penalties: *Heald* v *O'Connor*;[1] *Dressy Frocks* v *Bock*[4] at p 393 decided under the Australian Uniform Companies Act 1961, s 67; see also Ford, *Company Law* (2nd Ed, 1978), at p 180. In *Heald* v *O'Connor*,[1] Fisher J has held that the debenture in that case was prohibited by statute and for that reason was illegal and therefore void. It follows, therefore, that any transaction which has contravened any of the prohibitions in s 67 or s 133 of the Act is illegal and therefore void.

In the result, I find that the third party charge which was created by the plaintiff company in favour of the defendant co-operative society to secure an illegal loan made by the co-operative society to a director of the plaintiff company was illegal and therefore void and unenforceable by the co-operative society as it had contravened the prohibition in s 133 of the Companies Act 1965 on this type of transaction.

I therefore grant the declaration that was sought.

The plaintiff company has also sought an order for the cancellation of the registration of the charge on its lands and also for the return of all documents of title.

As I have pointed out earlier, the company cannot rely on s 133(5) as the subsection does not apply to the case of an action brought by the company to recover what it had given as guarantee or security to the person who had made a loan to a director of the company.

The general rule is that a party cannot recover what he has given to the other party under an illegal transaction. Ford has spoken of the harsh consequence of invalidity: see *Company Law* (2nd Ed, 1978) at p 180. I think it is necessary, for the sake of clarity, to quote the passage again:

> Although the Act does not expressly say that the contract by which the company gives the financial assistance (as, for example, a contract of loan) is void, this necessarily follows from the fact that the contract is made illegal by the Act. Thus a company could lend its money to a man to enable him to acquire its shares, and he could be under no obligation to repay. This seems a hard result since the company's assets would have been depleted and he would become the owner of the shares without paying their full value. But this is what the clear language of the Act is thought to require: *Dressy Frocks Pty Ltd* v *Bock* (1951) 51 SR (NSW) 390.

Mr Abraham has relied on the Australian case of *DJE Constructions* v *Maddocks*.[5] I shall read this passage from the judgment of Street CJ at pp 173 and 174:

> It was made clear in *Dressy Frocks Pty* v *Bock* (1951) 51 SR (NSW) 390 that a transaction infringing an earlier statutory provision corresponding with the present s 67 is illegal and void. In that particular case a loan made by a company to a person to enable that person to purchase shares was held to be illegal and void so as to be not recoverable by the company. In *Re Ferguson* (1969) 14 FLR 311 Gibbs J citing, inter alia, *Dressy Frocks Pty Ltd* v *Bock*, supra, at p 314 said: 'It has been held in a number of cases that an agreement which is made in breach of s 67, or a corresponding section of the Companies legislation, is not only illegal, so that it exposes the company and the officer of the company who are in default to penalties, but is also void ...' To the same effect is the decision of O'Bryan J in *Shearer Transport Co Pty Ltd* v *McGrath* [1956] VLR 316.
>
> The practical significance in proceedings between the immediate parties to a transaction of its being illegal and void is well known. In general terms, the party who needs, either to establish his claim or to sustain his defence, to place reliance upon and hence to adduce in evidence an illegal and void transaction, will fail (*Thomas Brown and Sons Ltd* v *Fasal Deen & Anor* (1962) 108 CLR 391 at pp 411 to 412). Put simply, the courts will take no cognizance of an illegal and void transaction in proceedings between direct parties to it. No party is permitted to place reliance upon such a transaction. There are exceptions to this rule in cases in which the parties are not regarded by the court as being in pari delicto. These exceptions were classified in three categories by Gibbs J in *Re Ferguson*, supra. The first category comprises cases in which the illegal and void contract was procured by fraud; the victim may recover. The second category comprises cases in which the contract is made illegal and void for the protection of a particular class of the community of which the plaintiff is a member; the plaintiff will be permitted to recover. The third category comprises cases in which the defendant was under a fiduciary duty to the plaintiff; the plaintiff will be permitted to enforce that duty.

Mr Abraham says that none of the three categories of exceptions to the general rule applies to the present case.

In *DJE Constructions* v *Maddocks*[5] at p 174, Street CJ said:

> There are exceptions to this rule in cases in which the parties are not regarded by the court as being in pari delicto. These exceptions were classified in three categories by Gibbs J in *Re Ferguson* (1969) 14 FLR 311.

In my judgment, I hold that the plaintiff's case comes within what Street CJ has described as the second category of exceptions to the general rule that a party cannot recover what he has given to the other party under an illegal contract. The second category comprises cases in which the contract or transaction is made illegal and void for the protection of a particular class of the community of which the plaintiff is a member; the plaintiff will be permitted to recover: see *DJE Constructions* v *Maddocks*[5] at p 174.

Vermeesch and Lindgren, *Business Law of Australia* (5th Ed, 1987) at p 267, para 733 has this to say:

> Effect of statutory illegality: The general rule that the courts will not give any assistance to the parties to a contract that is illegal from its inception is subject to certain exceptions. Thus, the plaintiff can recover property transferred under the contract:
>
> ...

> if the contract is of a kind made illegal by a statutory enactment in order to protect the interests of a particular class of person, and the plaintiff is himself one of such class: *Williams* v *Hedley* (1867) 8 East 378.

In support of this, I need only to refer to the well known case of *Wallersteiner* v *Moir*.[2] Lord Denning MR said at p 1014:

> In *Essex Aero Ltd* v *Cross* (17 November 1961; Bar Library Transcript No 388 of 1961), Harman LJ said: 'the section was not enacted for the company's protection but for that of its creditors; ... the company, ... cannot enforce it.' I do not agree. I think the section was passed so as to protect the company from having its assets misused.

Again, Scarman LJ said at p 1033:

> ... the section must have been enacted to protect company funds and the interests of shareholders as well as creditors. I do not agree with the dictum of Harman LJ in *Essex Aero Ltd* v *Cross* (17 November 1961; Bar Library Transcript 388 of 1961) to the effect that the section was enacted not for the company's protection but for that of its creditors.

Wallersteiner v *Moir*[2] was a case on s 54 of the English Companies Act 1948 but there is no reason to suppose that it is not equally applicable to s 190 of the English Companies Act 1948 and by the same token applicable to s 133 of our Companies Act 1965.

Applying *Wallersteiner* v *Moir*,[2] I am of the view that s 133 of the Act (and for that matter s 67) was passed to protect the company from having its assets depleted through misuse and not only to protect its creditors and shareholders: see the headnote of the report, at p 993. The charge transaction in the present case is made illegal and therefore void by virtue of s 133 of the Act which was enacted for the protection of companies from having their assets depleted through misuse. Thus, the plaintiff company will be permitted to recover against the defendant co-operative society by having the charge on its lands cancelled and for the return of all documents of title.

I would therefore grant the consequential orders sought. Costs to the plaintiff.

Application allowed.

Solicitors: *Asbir, Hira Singh & Co; Saheran & Woon.*

Reported by *PS Ranjan*

Sarawak Government v KCS Sawmill Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG 22 OF 1989
HAIDAR J
21 FEBRUARY 1990

Civil Procedure — Summary judgment — Whether available against government — Order made without hearing parties — Patent error — Whether court may exercise revisionary jurisdiction — Courts of Judicature Act 1964, ss 16 & 33 — Government Proceedings Act 1956, ss 29(1) & 42(1) — Rules of the High Court 1980, O 14 & O 73 r 5(1) — Subordinate Courts Rules 1980, O 1 r 4, O 26A & O 43

The respondent had commenced an action in the sessions court against the appellant, the government of Sarawak, and later applied for summary judgment against the appellant under O 26A r 2 of the Subordinate Courts Rules 1980. The appellant in turn applied to the sessions court for an order to strike out the respondent's application on the ground that no application may be made under O 26A r 2 of the Subordinate Courts Rules 1980 for summary judgment against the government. The sessions court judge dismissed the appellant's application and entered judgment in favour of the respondent even though the parties had not addressed her in respect of the respondent's application. The appellant appealed against the order dismissing its application but not against the order granting summary judgment against it. It was contended for the appellant that by virtue of various provisions of the Rules of the High Court 1980, particularly O 73 r 5(1), and by virtue of O 1 r 4(1) of the Subordinate Courts Rules 1980, no application for summary judgment may be made against the appellant and that such rule applied to proceedings in the subordinate courts as well, notwithstanding the absence of provision in the Subordinate Courts Rules 1980 similar to that of O 73 r 5(1) of the Rules of the High Court 1980.

Held, dismissing the appeal but setting aside the order for summary judgment:

(1) In respect of the High Court, the Rules Committee made O 73 r 5(1) of the Rules of the High Court 1980 by which no application for summary judgment against the government shall be made. However, in respect of the subordinate courts, the Rules Committee made provision for summary judgment under O 26A of the Subordinate Courts Rules 1980 without excepting an application for such judgment against the government. Nor does O 43 of the Subordinate Courts Rules 1980 in respect of proceedings by or against the government provide a similar provision as O 73 r 5(1) of the Rules of the High Court 1980 excepting summary judgment against the government, thereby implying that summary judgment against the government would appear to be available in the subordinate courts as opposed to the High Courts.

(2) It was clear that in making the order for summary judgment in favour of the respondent, the learned sessions court judge had not addressed her mind properly to such application but treated it as a matter of course that in dismissing the appellant's application she should allow the respondent's application. She had patently committed an error in making the order in favour of the respondent. As she had obviously committed an error in making such an order, this was a proper case for the court to exercise its revisionary powers under s 33 of the Courts of Judicature Act 1964 and accordingly the order for summary judgment was set aside and the case remitted to her for her to